INTERIOR BOARD OF INDIAN APPEALS

Estate of James Wermy Pekah

26 IBIA 200 (08/19/1994)

Related Board cases:

11 IBIA 237

13 IBIA 264

Dismissed, *Pekah v. Lujan*, No. CIV-90-1599-W (W.D. Okla. Apr. 23, 1991)

Affirmed, No. 91-6181 (10th Cir. Feb. 19, 1992)

34 IBIA 188

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF JOHN WERMY PEKAH	:	Order Docketing Appeal and Affirming Decision
	:	
	:	Docket No. IBIA 94-165
	:	
	:	August 19, 1994

Appellant John M. Wermy Pekah seeks review of a June 14, 1994, Order Dismissing Petition for Rehearing issued in this estate by Administrative Law Judge Richard L. Reeh. For the reasons discussed below, the Board affirms Judge Reeh's order.

The initial order in this estate was issued on April 15, 1982, by Administrative Law Judge Garry V. Fisher. Judge Fisher held that the entire estate of James Wermy Pekah (decedent) should pass to appellant, who had been adopted by decedent in an Oklahoma State court. Judge Fisher's order was appealed to the Board, which remanded the matter for a determination concerning whether the Oklahoma court had jurisdiction to render a decree of adoption involving appellant and decedent. Estate of James Wermy Pekah, 11 IBIA 237 (1983).

On remand, the matter was heard by Administrative Law Judge Sam E. Taylor. Judge Taylor concluded that decedent's adoption of appellant was void because the Oklahoma court lacked jurisdiction over the matter. Appellant sought rehearing from Judge Taylor, who denied it. Appellant then appealed to the Board. On September 26, 1985, the Board affirmed Judge Taylor's decision. Estate of James Wermy Pekah, 13 IBIA 264 (1985).

On September 28, 1990, appellant filed suit in the United States District Court for the Western District of Oklahoma, seeking to challenge the Board's 1985 decision. The district court dismissed the suit, stating: "[T]he Court finds that the Secretary of ([he] Interior's decision rendered on September 26, 1985 was final and conclusive, and not subject to judicial review. The Court further finds that the 1990 Amendment [1/] rendering such administrative actions subject to judicial review should not be applied

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1/ In 1990, 25 U.S.C. § 372 was amended to provide for judicial review of decisions of the Secretary determining the heirs of Indians who the intestate, owning trust property. Act of May 24, 1990, sec. 12(c), 104 Stat. 206, 211. Prior to the 1990 amendment, 25 U.S.C. § 372 provided that the Secretary's decisions were "final and conclusive."

retroactively." Pekah v. Lujan, No. CIV-90-1599-W, slip. op. at 6 (W.D. Ok. Apr. 23, 1991). The district court's decision was affirmed by the United States Court of Appeals for the Tenth Circuit. Pekah v. Lujan, No. 91-6181 (10th Cir. Feb. 19, 1992).

On June 3, 1994, appellant filed a document entitled "Petition for Rehearing" with the Superintendent, Anadarko Agency, Bureau of Indian Affairs. The Superintendent forwarded the petition to Judge Reeh, who denied it on June 14, 1994, stating:

> 43 C.F.R. § 4.241(a) provides that Petitions for Rehearing must be filed within 60 days after the date on which notice of the decision is mailed. As a Petition for Rehearing, the instrument filed by [appellant's attorney] is untimely and cannot be considered.
>
> Moreover, 43 C.F.R. § 4.241(e) provides, "Successive petitions for rehearing are not permitted, and . . . the administrative law judge's jurisdiction shall have terminated upon the issuance of a decision disposing of a Petition for rehearing" [Omission in original].

Judge Reeh further concluded that, even if appellant's petition were construed as a petition for reopening under 43 CFR 4.242, it must still be denied, because appellant had participated in the original proceedings.

It is apparent that Judge Reeh's order must be affirmed. As a petition for rehearing, appellant's petition was exceedingly untimely. 43 CFR 4.241(a). Further, appellant had previously sought rehearing in this matter, having filed a petition for rehearing of Judge Taylor's order in 1984. As Judge Reeh stated, 43 CFR 4.241(e) precludes successive petitions for rehearing.

Judge Reeh was also correct in his conclusion that the petition could not be granted even if construed as a petition for reopening under 43 CFR 4.242, because appellant had participated in the original proceedings. 2/ See, e.g., Estate of Ollie Bourbonnais Glenn Smith, 25 IBIA 1 (1993). See also Estate of George Dragswolf, Jr., 17 IBIA 10 (1988), discussing the reasons for the Department's rules governing reopening of estates. 3/

2/ 43 CFR 4.242(h) provides:

"If a petition for reopening is filed more than 3 years after the entry of a final decision in a probate, it shall be allowed only upon a showing that a manifest injustice will occur; that a reasonable possibility exists for correction of the error; that the petitioner had no actual notice of the original proceedings; and that petitioner was not on the reservation or otherwise in the vicinity while the public notices were posted."

3/ As the Board observed in Dragswolf, one of the principles underlying the Department's rules governing reopening of estates is the public interest in bringing the probate of estates to a final conclusion, so that the

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is docketed, and Judge Reeh's June 14, 1994, order is affirmed.

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge

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fn. 3 (continued)
property rights of the heirs and devisees may be stabilized. 17 IBIA at 12. The district court in Pekah v. Lujan cited a similar public interest when it declined to give retroactive application t o the 1990 amendment to 25 U.S.C. § 372:

"This Court finds that it is better public policy not to collaterally attack final decisions made by the Secretary of the Interior prior to 1990 which may affect the marketability of Indian title. In other words, to allow the 1990 Amendment to be applied retroactively would render all decisions by the Secretary of the Interior regarding Indian trust lands under Section 1 of the Act [i.e., 25 U.S.C. § 372] subject to collateral attack through judicial review. Such action would greatly disrupt marketability of Indian titles prior to 1990."
Slip op. at 6.